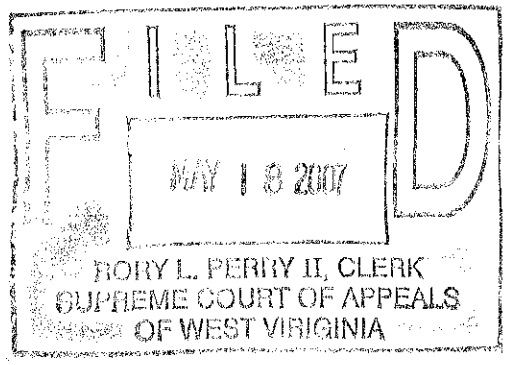
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA
Plaintiff below, Appellee,

v.

Underlying Proceeding
Indictment No. 04-F-40, 04-F-71
Preston County Circuit Court

JONATHON FREEMONT RAY,
Defendant below, Appellant.

APPELLANT'S AMENDED BRIEF

J. L. Hickok
Appellate Advocacy Division
Public Defender Services
Building 3, Room 330
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0730
(304) 558-3905

Counsel for Appellant

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INTRODUCTION

Jonathon Ray was convicted on seven counts of incest for sexual abuse of his brother's step children. He was acquitted on all charges involving Natalie Ray but convicted on the counts involving her brothers. Jonathon is unrelated by blood to any of the children; there is no consanguineous relationship. Jonathon is also intellectually impaired, although the extent of his impairment is in dispute. His actions at trial tell us more than the results of the tests used to evaluate him. This brief has been amended at the direction of the Court, and in keeping with the limited scope of review.

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

These proceedings were instigated in Preston County following Appellant's arrest in Monongalia County. Morgantown Police Officer, Mike Solomon, interviewed Mr. Ray on February 6, 2003. Jonathon described, "contact with a juvenile male, Brandon Molisee at Ruby Memorial Hospital in Monongalia County on November 26, 2002."

That investigation led to charges of "Sexual Assault by a Custodian." The Monongalia Indictment number 03-F-47 charges one count of "Sexual Abuse of a Child by a Custodian" and one count of "First Degree Sexual Abuse." He pled guilty to First Degree Sexual Abuse and was sentenced to an indeterminate term of from one to five years. As part of his plea bargain, the charge of Sexual Abuse by a Custodian was dismissed.

In Preston County, Appellant was indicted by the June 2004 Term Grand Jury (Indictment No. 04-F-40) on sixteen felony counts: the indictment contained seven counts of First Degree Sexual Assault (Counts 1 through 7), two counts of First Degree Sexual Abuse (counts 8 and 9) and seven counts of Incest (10 through 16). The alleged victims were Elijah Little in Counts 5 and 10, Scott Stone in Counts 6 and 15, and Natalie Ray in Counts 7 and 16. Appellant was arraigned on these charges on June 8, 2004, and bond was set at $100, 000.

At a hearing on a motion to reduce the bond, June 16, 2004, the Court found and expressed concern about Appellant's mental health history (166).[1] On September 3, the Court continued the scheduled jury trial until December 7. No motions were ruled upon.

The October Term of the Grand Jury returned Indictment No. 04-F-71, containing three additional counts of First Degree Sexual Assault involving Logan Stone and four counts of Sexual Abuse by a Parent, Guardian or Custodian. The victims in the latter four counts were alleged to be Logan Stone, Scott Stone, Natalie Stone[2] and Elijah

1 Any page number without a letter prefix refers to the Record as numbered by the Circuit Clerk.
2 In the March 25, 2005 hearing, the State moved to amend the indictment to change her name to Natalie Ray. The

Little. By a motion filed November 8, 2004, Ronald R. Brown, Esq., the Prosecuting Attorney, moved to dismiss Indictment No. 04-F-40. And, on the same date, the Prosecutor gave notice of the State's intent to introduce, under Rule 404(b) of the *West Virginia Rules of Evidence,* evidence of the acts previously charged in Monongalia County. The Court granted the State's motion to amend the indictment (04-F-71) by alleging a more specific date in Count 7. Counsel for Appellant moved for a continuance of the trial, and without objection it was continued to January 25, 2005.

The Court set a date for hearing all motions, including the motion to dismiss Indictment No. 04-F-40 on January 6, 2005. Melvin C. Snyder, III, Esq., succeeded Mr. Brown as Prosecuting Attorney and appeared on behalf of the State. Upon motion of counsel for Appellant, the trial was continued to March 29, 2005. On March 3, 2005, the State withdrew its motion to dismiss Indictment 04-F-40, and moved, instead, to instead dismiss Counts 1, 2, 3 and 7 of 04-F-71 as duplicitous and Count 5 of 04-F-40. The Court overruled Appellant's objection and granted the State's motion.

The Court denied the State's motion to introduce evidence of the Monongalia County offense under Rule 404(b) of the *West Virginia Rules of Evidence.* The Court deferred ruling on uncharged acts involving the victims in Preston County. Appellant pointed out that some of the offenses were alleged to have been committed at a time when Appellant was a juvenile.

Subsequently, the Court granted the State's motion to amend the indictments to allege that all of the charges occurred following Appellant's eighteenth birthday, and ruled that the uncharged acts concerning the Preston County victims could be

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motion was granted over counsel's objection (Motions hearing: 168-169).

introduced under Rule 404(b), *supra*, "only as reflected in the counseling notes of Terry Laurita Sigley or as any of the alleged victims themselves may testify . . . for the limited purpose of showing lustful disposition to each alleged victim as permitted in *State v. Edward L.*" (T: 176)

The case against Appellant was tried on March 29 and 30, 2005. Since no evidence was presented concerning Natalie Ray, the Court directed a verdict of "not guilty" to Counts 7 and 16 in Case No. 04-F-40 and Count 6 in Case No. 04-F-71 (T: 446-447). In Case No. 04-F-40, Mr. Ray was convicted on five counts of first degree sexual assault, three counts of first degree sexual abuse and five counts of incest. In Case No. 04-F-71, he was convicted on two counts of sexual abuse by a Parent, Guardian or Custodian.

Appellant was sentenced to consecutive 15 to 35 year terms for each of the five First Degree Sexual Assault convictions and to consecutive 1 to 5 year terms for each of the three First Degree Sexual Abuse convictions. The Incest and *Sexual Abuse by a Custodian* convictions were all run concurrently with the First Degree Sexual Assault convictions, for an effective sentence of 78 to 190 years.

On May 26, 2006, Appellant was resentenced for purposes of this appeal and on September 26, 2006, the Court extended the period for appeal until October 10, 2006. The petition was filed by mail on September 26, 2006. By Order of February 28, 2007, the petition was granted on the sole issue of the conviction on the incest counts.

II. STATEMENT OF FACTS

In a videotaped statement Mr. Ray admitted having sexual contact with his brother's stepsons, Logan and Scotty Stone. Ray's brother is George Ray[3] and his wife is Crystal Ray, the children's biological mother. There is no consanguinity between Appellant and his brother's stepsons.

III. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED

The Court erred by failing to dismiss the charges of incest concerning George Ray's stepchildren.

IV. POINTS AND AUTHORITIES

1. Incest is a statutory crime and was not a crime at common law. Therefore, whatever elements are necessary to constitute the offense of incest are prescribed wholly by the particular statute. *U.S. ex rel. Preece v. Coiner*, 150 F. Supp 511 (N.D. W.Va., 1957);

2. A person is guilty of incest when such person engages in sexual intercourse or sexual intrusion with his nephew. Nephew is defined, "For the purposes of this section" of the Code as, "the son of a person's brother or sister." *West Virginia Code*, §61-8-12(a)(11);

3. "Son," for the purposes of the incest statute, includes "the son of a person's husband or wife." *West Virginia Code*, §61-8-11(a)(15);

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3 Formerly identified as George Ray, III, but simply called "George Ray" hereinafter.

4. The *blood relationship* between the parties renders defendant's act in having sexual intercourse with his daughter incestuous and criminal. *State v. Wright*, 130 W.Va. 336 at 341, 43 S.E.2d 295 at 299 (1947);

5. The accused must be fully and plainly informed of the character and cause of the accusation. *West Virginia Constitution*, Article III, Section 14;

6. A statute which undertakes to create a statutory offense must define or specify the acts necessary to constitute the offense with sufficient certainty to enable a person to know, when he does an act, whether it is forbidden by the statute. *State v. Harrison*, 130 W.Va. 246, 43 S.E.2d 214 (1947);

7. Unless an act of the Legislature creating a statutory offense satisfies the requirement of certainty in the description of the crime, it is violative of the constitutional provisions that in all trials the accused shall be fully and plainly informed of the character and the cause of the accusation, and that no person shall be deprived of life, liberty, or property without due process of law, and is void for uncertainty and indefiniteness. *West Virginia Constitution*, Article III, Section, 10; *West Virginia Constitution*, Article III, Section 14.

V. ARGUMENT

The Court erred by failing to dismiss the charges of incest concerning George Ray's stepchildren; Appellant was indicted by the June 2004 Term Grand Jury (Indictment No. 04-F-40) on seven counts of First Degree Sexual Assault, two counts of First Degree Sexual Abuse, and seven counts of Incest. By a motion filed November 8, 2004, Ronald R. Brown, Esq., the Prosecuting Attorney, moved to dismiss

Indictment No. 04-F-40, and to proceed under Indictment No. 04-F-71, which did not contain incest counts.

The Court did not act upon his motion until the new Prosecutor withdrew it on March 3, 2005. However, the Prosecutor noted that Counts 1, 2, 3 and 7 of 04-F-71 are duplicitous and that there is no basis in fact for Count 5 of 04-F-40. Citing *State v. Hatfield*, 181 W.Va. 106, 380 S.E.2d 670 (1988), the State moved to dismiss the aforesaid counts and to join the remaining counts for trial. Appellant objected, citing Rule 8(a)(2) of the *West Virginia Rules of Criminal Procedure*. The Court overruled the objection and granted the State's motion, citing *State ex rel Blaney v. Reed,* 215 W.Va. 220, 599 S.E.2d 643 (2004).

The Trial Court apparently relied upon the following language in *Blaney:*

> [U]nder Rule 8(a)(2) of the West Virginia Rules of Criminal Procedure, when the prosecuting attorney is or should be aware of two or more offenses . . . based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan . . . all such offenses must be prosecuted in a single prosecution.

It is a fair assumption that former Prosecuting Attorney Ron Brown was aware of Rule 8(a)(2) and the *Blaney* decision, and yet he moved to dismiss the first indictment. Since he was never heard on his motion and Mr. Snyder withdrew it, we can't be certain why he proceeded in this fashion, but the most striking omissions from the second indictment are the incest counts.

George Ray is the stepfather of Logan and Scott Stone, and father to Natalie Ray, the alleged victims. George Ray, Jonathan Ray's brother, is married to Crystal Ray, mother of all three children. Counsel argued that George is not the father of

Crystal's sons, and that *West Virginia Code*, §61-8-12 defines incest as "involv[ing] a consanguineous relationship."

> The Legislature recognizes stepparents with regard to domestic violence, but they did not include it with regard to incest. Incest is a particular consanguineous sex crime. You have to be a blood relative. Otherwise, it would be sexual assault. It would be sexual abuse. It would be another different crime. Incest is specific to consanguineous relationships, and . . . George Ray, III is not the father of Logan and Scottie, and therefore, incest could not have occurred between Jonathon and Logan and Scottie even if you believed the acts occurred.

(T: 444-445)

The applicable provision of the statute is §61-8-12(b), which provides "A person is guilty of incest when such person engages in sexual intercourse or sexual intrusion with his . . . nephew[.]"[4] In §61-8-12(a)(11), nephew is defined "For the purposes of this section" of the Code as "the son of a person's brother or sister."

Incest is an ancient crime. "And if a man shall take his sister, his father's daughter, or his mother's daughter . . . it is a wicked thing." *Leviticus,* 20: 17. (KJV) The biblical prohibitions seem to be directed toward preserving the family structure rather than preventing genetic defects. While both are worthy objectives, modern incest laws are based primarily on the latter motivation.

Incest was not a crime punishable by the Common Law of England. It was punishable by the ecclesiastical courts as an "offense against good morals." It was sometimes defined as being a sexual relationship, "between persons so closely related that marriage between them would be void." 41 ALR 5th 723. *Encyclopedia Britannica,* Online, contains the following exposition for *incest*: "Sexual relations between persons

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4 *In toto,* the statute delineates incestuous relationships as involving a person's "father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle a\or aunt."

who, because of the nature of their kinship ties, are prohibited by law or custom from intermarrying."

The incest taboo is generally universal, although it is imposed differently in different societies. Usually, the closer the genetic relationship between two people, the stronger and more highly charged is the taboo prohibiting or discouraging sexual relations. As this Court said in *State v. Wright*, 130 W.Va. 336 at 341, 43 S.E.2d 295 at 299 (1947), "The *blood relationship* between the parties renders defendant's act in having sexual intercourse with his daughter incestuous and criminal." [emphasis added]

In *U.S. ex rel. Preece v. Coiner*, 150 F. Supp 511 (N.D. W.Va., 1957), the Court said, "Incest is a statutory crime and was not a crime at common law. Therefore, whatever elements are necessary to constitute the offense of incest are prescribed wholly by the particular statute." The Court determined that, "the only material elements of the offense are (1) sexual intercourse, (2) between persons of the prohibited relationship."

The Trial Court herein concluded that George Ray's stepson was included in the definition of incest by reading §61-8-11(a)(15), which provides that "Son" includes "the son of a person's husband or wife." While that may be the intended construction, it is not prescribe wholly by the *particular statute*, as required by *Preece,* and it does not meet the requirements of the *West Virginia Constitution,* Article III, Section 14, that, "the accused be fully and plainly informed of the character and cause of the accusation."

The statute is ambiguous when applied to a step-child. The Court had to read the two provisions *in pari materia* in order to conclude that sex with a brother's step-

child was incestuous. In justifying his ruling, the Court made a curious comment:

> *If I didn't have these definitions of son and daughter*, then I would probably grant your motion; but if I strictly construe the statute, and I read the definition of niece and nephew . . . [t]hen if I look at the definition of son and daughter . . . [and] it includes the son or daughter of the person's wife and so I am not stretching this or giving meaning other than the definitions that the legislature provided here." [emphasis supplied]

(T: 452)

Appellant takes issue with the Court's characterization of how the statute was construed; a strict construction would augur for dismissal of the incest charges. The meaning of the statute, when applied to a brother's step-child, is ambiguous.

In *State v. Craig*, 254 Kan. 575, 867 P.2d 1013 (1994) the Court construed the following statute:

> Aggravated incest is: (1) Marriage to a person . . . or (2) engaging in: (A) Otherwise lawful sexual intercourse or sodomy . . . or (B) any lewd fondling, as described in *K.S.A.*, 21-3603 and amendments thereto, with a person who is . . . related to the offender as any of the following biological, step or adoptive relatives: Child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

The Kansas Court held that, "The sexual relationship between a half-blood uncle and the victim, a minor daughter of a half-brother, is not contemplated under *K.S.A.*, 21-3603.

If the Trial Court in this case was uncertain, then imagine the ordinary citizen who tries to understand the statute. In *State v. Harrison*, 130 W.Va. 246, 43 S.E.2d 214 (1947) this Court said, "In this jurisdiction a statute which undertakes to create a statutory offense, to be valid, must define or specify the acts necessary to constitute the offense with sufficient certainty to enable a person to know, when he does an act, whether it is forbidden by the statute." If we apply the same test to *West Virginia Code*,

§61-8-12, where is the prohibition regarding a step-nephew? There was a blood relationship in *Craig* but there is none in the instant case. As the *Harrison* Court stated:

> Unless an act of the Legislature creating a statutory offense satisfies this requirement of certainty in the description of the crime, it is violative of the constitutional provisions that in all trials *the accused shall be fully and plainly informed* of the character and the cause of the accusation, Section 14, Article III, *Constitution of West Virginia*, and that no person shall be deprived of life, liberty, or property, without due process of law, Section 10, Article III, *Constitution of West Virginia*, and is void for uncertainty and indefiniteness.

Appellant was not fully and plainly informed that such an act was incestuous. He might know that a minor was incapable of consent and that his act was wrong, but incest is another crime, although related to his other offenses. As counsel argued at trial, if such an interpretation had been intended, the legislature "would have . . . expressly stated it, the way they do in domestic violence[5] statutes." (T: 448)

Appellant probably would not have understood a well worded statute, but we may presume that the *Harrison* Court was referring to the reasonable prudent accused person of legal mythology. Courts need to be fully and plainly informed so that they can make proper rulings and properly instruct juries. If the Court had to read two distinct and separate statutes *in pari material* in order to arrive at its interpretation, it was not fully and plainly informed.

Double Jeopardy

In Syllabus Point #1 of *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977), the three main principles of the Double Jeopardy Clause in the *West Virginia Constitution*, Article III, Section 5 of the were delineated:

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5 See the definitions in *W.Va. Code*, §48-27-204

> The Double Jeopardy Clause . . . provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.

"Incest" is a statutory crime. *West Virginia Code*, §61-8-12(b) provides that, "A person is guilty of incest when such person engages in sexual intercourse or sexual intrusion[.]" Each count of incest was mirrored by a separate count of First Degree Sexual Assault against the same alleged victim.

The incest counts fail under either analysis: the statute does not "fully and plainly" inform Appellant of the "character and cause" of the accusation and the legislature has not explicitly permitted multiple prosecutions for each single offense. The strongest argument for Appellant's position is that the Court had to read three separate sub-sections of the incest statute before concluding that, read *pari materia,* they covered sexual contact with a brother's wife's child whose legal and biological father is not a relative of the accused. By stretching the point, the Court permitted unauthorized multiple prosecutions, in violation of the prohibition against twice being placed in jeopardy for the same offense.

This Court has long recognized the *rule of lenity* where a criminal statute contains ambiguous language. It requires that such statutes be strictly construed against the State. See *State v. Hulbert*, 209 W.Va. 217, 544 S.E.2d 919 (2001). Similarly, you have construed an ambiguous plea agreement in favor of the defendant in *State ex rel Forbes v. Kaufman*, 185 W.Va. 72, 404 S.E.2d 763 (1991). If *West Virginia Code*, §61-8-12(a)(11) was intended to cover a brother's stepchild, it is ambiguous at best. As applied to Appellant, it permitted multiple charges (and multiple

convictions) for the same acts.

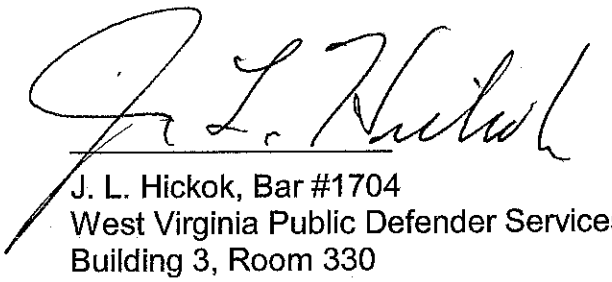
It has been held that multiple prosecutions and convictions for the same act are not violative of the Double Jeopardy prohibition when the legislative intent is clear from the face of the statute or from the legislative history. *Garrett v. United States*, 471 U.S. 773, at 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). That rationale explains this Court's decision in *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992). *Gill* involved a double jeopardy challenge to *West Virginia Code*, §61-8D-5(a), which creates a *separate and distinct offense* for sexual abuse of a child by a parent, guardian or custodian. There is in the statute nothing explicitly permitting the charge of incest for sexual intercourse between Appellant and his brother's stepsons.

CONCLUSION

The charges of incest were excessive and the punishment is cruel and unusual. This Court should remand this case to the Circuit Court and direct the dismissal of the incest convictions. On behalf of Petitioner, counsel objects to the refusal to consider the issue of Appellant's competency to assist counsel, to understand legal advice or to testify on his own behalf.

Respectfully submitted,

Jonathon Freemont Ray,
By Counsel



J. L. Hickok, Bar #1704
West Virginia Public Defender Services
Building 3, Room 330
1900 Kanawha Boulevard, E.
Charleston, WV 25305-0730
Telephone (304)558-3905

Counsel for Appellant

CERTIFICATE OF SERVICE

I, J. L. Hickok, counsel of record for Jonathon Freemont Ray, hereby certify that on the 8th day of **May, 2007**, I served a copy of the foregoing **Appellant's Amended Brief** upon the following, at their respective addresses and in the manner noted below:

Hon. Darrell McGraw
WV Attorney General
Bldg. 1, Rm. E-25
1900 Kanawha Blvd., E
Charleston, WV 25305-0220

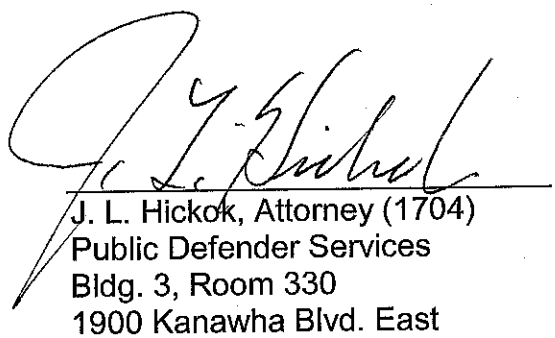
Via hand delivery

Melvin Snyder
Preston County Prosecuting Attorney
106 West Main Street
Room 201
Kingwood, WV 26537

Via US Mail

Jonathon Freemont Ray - DOC # 34913
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

Via US Mail



J. L. Hickok, Attorney (1704)
Public Defender Services
Bldg. 3, Room 330
1900 Kanawha Blvd. East
Charleston, WV 25305-0730